OPD APPELLATE WINS - SEPTEMBER TO DECEMBER 2008

The Appellate Section of the OPD had major wins in the last third of 2008.

CONFESSIONS AND OTHER STATEMENTS

Order suppressing defendant's two statements affirmed in part and reversed in part by the Appellate Division. With regard to defendant's original oral statement at the hospital, the Court was satisfied that the technique Miller used, repeatedly accusing defendant of lying, when combined with defendant's refusal to sign the waiver card and Miller's failure to ensure that defendant was willing to waive his right to remain silent before "prodding" him as he did, was ultimately incompatible with a voluntary and knowing waiver. As to whether defendant's later taped statement at police headquarters, was an instance of the "question-first, warn-later' interrogation technique that was condemned in State v. O'Neill, 193 N.J. 148, 180 (2007), the Court noted that defendant's earlier statement to police at the hospital was preceded by Fussner's Miranda warnings and by defendant's acknowledgment to Fussner that he understood those rights, whereas in O'Neill police extracted damning admissions long before giving the defendant any Miranda warnings. Consequently, even though there was no waiver of the privilege before defendant made statements at the hospital, this case involves the imperfect administration of the Miranda procedures and not the blatant failure to warn that the Court addressed in O'Neill. (State v. Allen Henry Miller, October 29, 2008; Eric R. Shenkus, A.D.P.D.)

CONFRONTATION

Conviction reversed by the Appellate Division. Defendant argued that his Sixth Amendment right of confrontation was unduly restricted when he was not permitted to cross-examine Morrieson, a critical State's witness, about a potential motive he may have had for testifying favorably for the State. Defense counsel attempted to demonstrate during cross-examination that Morrieson, as a result of a prior conviction, was subject to community supervision for life, which is lifetime parole, a fact that might suggest it was in his interest to provide favorable testimony for the State. The existence of this pervasive and long-term regulation of persons subject to CSL demonstrated the State's considerable "hold" over Morrieson. Considering the importance of Morrieson's testimony to the State's case, a limitation on defendant's right to cross-examine Morrieson about potential bias, based upon a misunderstanding of the extent of the State's hold over Morrieson, was erroneous. See also **LESSER INCLUDED OFFENSES**. (State v. William Chisholm, November 26, 2008; James K. Smith, Jr., A.D.P.D.)

CONTEMPT

Order finding contempt of court by a Public Defender staff attorney vacated. The Appellate Division did not believe that Harkov's conduct rose to the level of criminal contempt. The record reflects Harkov's display of personal pique did not 'obstruct' the proceedings; and we are satisfied that there was no real danger that it would have done so. However ill-advised Harkov's conduct may have been, it did not have the capacity to undermine the court's authority or to interfere with or obstruct the orderly administration of justice. In addition, the trial judge failed to afford Harkov his right under Rule 1:10-1(e) to respond and explain his conduct. (In the Matter of Anderson Harkov, Attorney at Law, November 14, 2008; Jay L. Wilensky, A.D.P.D.)

CRIMES AND OFFENSES - ELEMENTS

Convictions for first degree robbery and aggravated assault reversed and the case remanded for entry of judgments of acquittal. As to defendant's **first-degree robbery** conviction, in which the jury found him guilty as an accomplice of using both the Lexus and the Infiniti as a deadly weapon, the Appellate Division concluded that the State's proofs demonstrated merely that defendant was present as a passenger in the stolen Lexus and Infiniti while each vehicle was used to ram a police vehicle. No evidence demonstrated that defendant could have, or even did, anticipate that Jones and Coleman would do so, much less that he shared in their intention to do so. As to the convictions for **aggravated assault**, the evidence was also insufficient, even with all reasonable inferences given to the State, to prove defendant shared Jones's and Coleman's purpose to inflict bodily injury on Officers Uranyi and Dillon and that he agreed to aid them in doing so. See also **JURY INSTRUCTIONS**. (State v. Kenneth Daniels, October 23, 2008; Steven M. Gilson, Designated Counsel)

Adjudication of delinquency for **fourth degree criminal sexual conduct** reversed and judgment of acquittal ordered by the Appellate Division. The Court concluded that the State must prove defendant used "physical force" in order to sustain the charge of criminal sexual contact under N.J.S.A. 2C:14-3b, and was convinced that the judge failed to find that defendant used any "physical force" whatsoever and instead based his adjudication of delinquency on the mistaken belief that the State need only prove that sexual contact occurred. (State in the Interest of K.K., October 30, 2008; Frank J. Pugliese, A.D.P.D.)

Conviction for **forgery** reversed and remanded for entry of judgment of acquittal by the Appellate Division. The State conceded that the evidence wass purely circumstantial in nature.

relying upon the premise that defendant signed Darrell Kennedy's name on the fingerprint cards. The arresting officer did not know who actually signed the fingerprint cares and only identified the name that appeared on the fingerprint cards. No offer was made of the officer who had witnessed the signatures, no offer was made to identify Darrell Kennedy, no comparison of the consent form signature and the fingerprint signatures was made or offered, no explanation was made or offered as to the procedures utilized regarding the signing of these fingerprint cards or under whose direction and supervision the cards were signed. Therefore, the State failed to prove the elements of a forgery offense, specifically that Kennedy "made, completed, executed, authenticated, issued or transferred the writing." (State v. Akheen Kennedy, October 23, 2008; Alyssa Aiello, A.D.P.D.)

Felony murder and robbery convictions reversed in a published opinion in a case in which a defendant charged as an accomplice was found guilty of robbery because he uttered an instruction to the principal, during the immediate flight from an attempted theft, to hide the weapon used during the attempted theft, after all necessary elements of the crime of robbery had concluded. The Court held that the phrase contained in the robbery statute, '[a]n act shall be deemed to be included in the phrase "in the course of committing a theft,"' N.J.S.A. 2C:15-1a, does not encompass other acts committed by an alleged accomplice after all elements necessary to constitute the crime of robbery have concluded. The Court also concluded that standing alone, **defendant's instruction to Davis during the course of immediate flight to discard or hide the weapon used in the attempted theft does not constitute aiding or attempting to aid Davis in the commission of the attempted theft under the accomplice liability** statute. (State v. Quadir Whitaker, September 18, 2008; Kevin G. Byrnes, Designated Counsel)

DISCOVERY

Convictions reversed because the trial court should not have excluded a key defense witness' testimony as a discovery sanction. The court instead should have explored less drastic measures, such as a brief adjournment of the trial, to address the asserted surprise to the State. The trial court unfortunately did not undertake an analysis of the totality of pertinent factors before striking Jeremy Rodriguez's account of what the murder victim had supposedly told him, and before it conclusively instructed the jury to disregard that testimony. the victim's statement to Rodriguez that he did not see "anybody" before he was shot, implicitly including his assailant, was pivotal evidence. It directly contradicted Broome's statement to the police that he had seen the victim talking with defendant before defendant shot him. Because the State's entire case against defendant depended upon whether or not the jury believed Broome's later-recanted identification in his

police statement, any evidence tending to impeach that police statement was highly relevant and tended to exculpate defendant. (State v. Michael Damon, December 16, 2008; Gilbert G. Miller, Designated Counsel)

EVIDENCE

Order finding that DYFS proved by preponderance of the evidence that M.C. had abused his children reversed, case remanded for further proceedings by the Appellate Division because the **medical records used to prove the abuse were not hospital business records** "made in the regular course of [Cooper Hospital's] business ." N.J.R.E. 803(c)(6). Rather, these records were all DYFS-generated documents created in the wake of Dr. Lewis' referral to the agency. These documents contained hearsay references to the doctor's opinions, as well as "double hearsay" references to the children's statements allegedly made to hospital staff. Dr. Lewis, as noted, filled out these medical examination forms provided by DYFS; none of Dr. Lewis' hospital records were introduced into evidence; nor did the doctor testify at the hearing. The admission of these DYFS-generated documents were clearly capable of producing an unjust result because the trial judge relied directly upon that unreliable and inadmissible evidence in finding that the children had been abused and neglected. See also **GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS**. (DYFS V. M.C./Matter of M.C., IV, and N.C., December 31, 2008; Michael C. Wroblewski, Designated Counsel, for M.C.; James A. Louis, D.P.D., and Olivia Belfatto Crisp, A.D.P.D. [on the brief], Law Guardians)

Convictions reversed because the trial judge erroneously excluded the testimony of two defense witnesses, deeming them to be alibi witnesses whose identity was not properly disclosed to the State under the Court Rules. Defendant proffered that two witnesses would testify that it was defendant's custom to go crabbing on a regular basis in the summer on workdays after his shift ended. This would thus give rise to an inference that it was highly unlikely defendant would have been in the location where the drug transaction took place. The proffered testimony was **not properly 'alibi,' but habit or routine practice**, which is admissible pursuant to N.J.R.E. 406. In other words, the alibi-notice rule was not applicable. Although defendant violated Rule 3:13-3(d)(3), which requires a defendant to provide witnesses information to the State no later than seven days before arraignment or status conference, this violation was not repeated and flagrant. Therefore, a measure less severe than preclusion should have been considered. (State v. Floyd Nance III, December 11, 2008; Daniel Brown, Designated Counsel)

GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS

DYFS V. M.C./Matter of M.C., IV, and N.C., ? N.J. Super. ?, 2008 N.J. Super. LEXIS ? (December 31, 2008) – Order finding that DYFS proved by preponderance of the evidence that M.C. had abused his children reversed by the Appellate Division because the evidence presented during the fact-finding hearing was insufficient to support the determination that M.C. III abused or neglected his children. The trial judge essentially made no findings as to credibility. Her finding that "no matter which version you believe, what happened was that [defendant] grabbed his son by the neck," ignores defendant's testimony that he grabbed M.C. IV by his shirt as his son was going upstairs, and appears to be based exclusively upon M.C. IV's statement to Still. The judge relied upon the DYFS-generated documents to conclude that the children exhibited markings "consistent with an assault" and that such an assault had been committed by defendant. That reliance would explain the judge's acceptance of M.C. IV's statement that defendant grabbed him 'by the neck,' over defendant's testimony that he grabbed his son's shirt. These documents did not satisfy the prerequisites for "a reasonably high degree of reliability as to the accuracy of the facts contained therein," and do not meet the requirements set forth in N.J.S.A. 9:6-8.46(a)(3). Therefore, those documents and the trial judge's reliance upon them were clearly capable of producing an unjust result. See also **EVIDENCE**. (DYFS V. M.C./Matter of M.C., IV, and N.C., December 31, 2008; Michael C. Wroblewski, Designated Counsel, for M.C. III; James A. Louis, D.P.D., and Olivia Belfatto Crisp, A.D.P.D. [on the brief], Law Guardians)

Order directing change of custody to S.S. reversed, case remanded for further proceedings in this published Appellate Division decision. The Court agreed with both the Law Guardian's and DYFS's arguments that the second trial judge erroneously ordered K.S.H. to be returned to S.S.'s custody without having provided prior notice to the parties and without having conducted an evidentiary hearing on the issue of change of custody. Also, the trial court's order returning K.S.H. to the custody of S.S. was not supported by competent evidence. At the second trial, no witnesses testified and no documents were admitted into evidence. The proceeding involved only a colloquy between the court; counsel for DYFS; the Law Guardian; S.S., who represented herself; and an unidentified DYFS caseworker present in the courtroom. Moreover, there was no attempt to exclude inadmissible hearsay, and the trial court relied upon reports that had not been admitted into evidence.(DYFS and Lawnside Borough Board of Education v. S.S./Matter of K.S.H., October 31, 2008; Melissa R. Vance, A.D.P.D., Law Guardian)

Although the trial court ultimately returned the children to S.B.'s care and custody, the Appellate Division reversed a Family Part order finding she abused or neglected the children.

Defendant's failure to cooperate, which resulted in her incarceration, does not, by itself, support a finding of abuse or neglect. Moreover, the evidence presented during the factfinding hearing did not establish that S.B. failed to exercise a minimum degree of care for her children's welfare. There was no evidence that S.B.'s conduct caused harm to her children or that S.B. unreasonably exposed the children to a substantial risk of harm. (DYFS v. S.B./Matter of H.B. and J.D., October 31, 2008; Robert H. McGuigan, Designated Counsel, for S.B.; Caryn M. Stalter, A.D.P.D., Law Guardian)

In reversing a default judgment terminating parental rights and remanding the for further proceedings, the Appellate Division ruled that the Family Part Judge misapplied his discretion in declining to vacate the default judgment entered against the mother in this matter. There was substantial doubt that the mother received effective notice of the proof hearing conducted in this case and that the lack of notice caused her not to attend. Even if the mother did receive her counsel's letter in a timely fashion, contrary to the uncontradicted representations of her counsel, the letter was not written in Creole, as the judge had previously indicated that fairness dictated and he thus required. Moreover, this was not a case in which the mother demonstrated a consistent pattern of failing to attend court hearings and a concomitant disinterest in her son. In fact, the mother attended eight out of eleven hearings prior to entry of default.(DYFS v. G.F./ Matter of Guardianship of J.F., October 31, 2008; Justin J. Walker, Designated Counsel, for G.F.; Melissa R. Vance, A.D.P.D., Law Guardian)

In vacating an order terminating K.G.'s ("Karen") parental rights reversed, the Appellate Division held that DYFS failed to present sufficient evidence to satisfy its burden of proof as to three of the four prongs codified in N.J.S.A. 30:4C-15.1a. Specifically, the Division's initial decision to remove the children from their mother's custody was factually unwarranted and legally unsustainable. As a result of this action by DYFS, the children became needlessly estranged from their mother. While this case was pending judicial review, Karen took affirmative steps to address the problems that led to DYFS's intervention. Despite some early setbacks she: (1) successfully participated in an outpatient drug rehabilitation program; (2) completed a program in domestic violence awareness, which included both personal counseling and parenting classes; (3) terminated her dysfunctional and abusive relationship with Lyle's father J.L.; and (4) with her mother's support, secured steady employment and obtained suitable housing for herself and her children. Therefore, DYFS failed to show how termination of Karen's parental rights was the only means of eliminating the potential harm posed to the children from being raised by a drug-addicted parent in recovery. (DYFS v. K.G. and

T.S. and J.L./Guardianship of A.S., V.S., and L.L., October 24, 2008; Michael C. Kazer, Designated Counsel, for K.G.; Lisa C. Castaneda, A.D.P.D., Law Guardian)

Order dismissing Title 9 abuse and neglect complaint and authorizing DYFS to file a Title 30 guardianship complaint reversed, case remanded by the Appellate Division. The children were removed on an emergent basis when defendant was arrested on outstanding warrants, but there was never a finding that defendant met the criteria relieving DYFS of its responsibility to provide reasonable efforts to reunify the child with their mother. Nevertheless, the permanency hearing was held at which only termination of parental rights was considered. Although defendant was provided with minimal procedural due process, in that she was given notice of the hearing and had counsel assigned to her, the scant evidence in the record did not demonstrate by a preponderance of the evidence that defendant abused or neglected the children, that DYFS made reasonable efforts at reuniting the children with their mother or that the permanency plan was in the children's best interests. Most of the information presented to the court was by representation of counsel and defendant was the only witness who testified under oath. Moreover, the court did not even consider the alternative of a kinship legal guardianship. Accordingly, the order was reversed and the matter remanded for a dispositional hearing at which defendant is represented by counsel, documentation is admitted into evidence, the caseworker is available for cross-examination and defendant has the opportunity to present evidence in support of her efforts to comply with remediation services and establish her interest in a kinship legal guardianship as an alternative to termination of parental rights. (DYFS v. T.M./In the Matter of L.L.and R.L., November 19, 2008; Carol A. Weil, Designated Counsel, for T.M.; Phyllis G. Warren, A.D.P.D., Law Guardian)

GUILTY PLEAS

Conviction and guilty plea reversed, case remandedby the Appellate Division because (1) Pinto did not give the trial judge an adequate factual basis for the plea under the circumstances of this case and (2) the trial judge applied the wrong standard on the motion to withdraw the plea. Once Pinto raised facts that suggested the possibility of a duress defense, the trial judge should have explored that issue further, rather than just indicating that he would not accept the plea, asking only the one further question, and then accepting the plea. Pinto's suggestion that he did what he was asked to do by others because they had guns should have prompted further questioning by the trial judge to determine whether, in fact, Pinto harbored a belief that he was not culpable despite his having assisted the co-defendants and whether he understood and was voluntarily foregoing his right to raise such

a defense. Those issues go to the voluntariness of the plea itself. In denying the motion to withdraw the plea, the trial judge failed to apply the correct legal standard. He relied upon Rule 3:9-3(e), which is applicable if at 'the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence.' That rule was inapplicable in this case because: (1) Pinto made his motion prior to sentencing; and (2) the trial judge had not determined that he could not impose the agreed upon sentence." (State v. Hjalmar Pinto, December 29, 2009; Raquel Y. Bristol, A.D.P.D.)

INEFFECTIVE ASSISTANCE OF COUNSEL

Denial of PCR reversed, case remanded because trial counsel's representation of both defendant and Charles Cottman, who allegedly participated in crimes with defendant, placed counsel in a per se conflict of interest. Defendant is entitled to be resentenced following a determination of what might have occurred had defendant sought to cooperate with law enforcement regarding the Cottman prosecution. Here, after defendant entered a plea of guilty but before he was sentenced, a pool attorney, was assigned by the public defender's office to represent Cottman. Whether or not he was aware of it, that attorney was in possession of discovery in both cases that revealed that the State believed defendant and Cottman had approached and allegedly threatened a victim of a robbery they had allegedly committed. There was thus a potential that each client could be a witness against the other. Defendant had already pled guilty and was facing a potentially lengthy prison sentence; arguably, he could have provided useful information to the State regarding the conduct of Cottman." (State v. Anthony Alexander, October 10, 2008; Durrell Wachtler Ciccia, Designated Counsel)

In this appeal, the issue was whether defendant was deprived of the effective assistance of counsel when his trial attorney failed to seek a Wade hearing regarding the victim's identification of him at a showup. The Court felt that the case could not adequately be resolved absent the conducting of an evidentiary hearing into defense counsel's reasons for failing to request a Wade hearing. Regardless of the determination on the effectiveness-of-counsel issue, the trial court was ordered to hold a Wade hearing to complete the record. Judge Fisher, concurring in the remand, nonetheless "harbor[ed] doubts about whether there could be a principled reason for defendant counsel's failure to request a Wade hearing.... Just as one would expect a doctor, during a routine physical, to listen to the patient's heart with a stethoscope or to take a reading of the patient's blood pressure, so too should the demands of our profession require that, in the

circumstances presented here, an attorney seek the suppression of an identification that occurred at what must be conceded was an impermissibly suggestive showup." (State v. Mario Chipi, September 22, 2008; Sylvia Orenstein, A.D.P.D.)

JURY DELIBERATIONS

Conviction reversed because the record made provided inadequate factual bases for determining whether the juror who may have spoken to defendant during deliberations could continue discharging his duties. In questioning the juror and others involved, the trial judge failed to develop adequately whether the juror's interaction with defendant, or his motivation in speaking with defendant at all, inhibited that juror's ability to decide the case solely on the evidence presented at trial. The judge's finding in this case that the juror's denial he had told defendant 'it doesn't look good' was to be believed was inadequately grounded. No determination of the presence or absence of some personal basis amounting to bias or other inability to continue had been made; the question whether the juror had in any way disregarded the court's instructions concerning juror conduct remained unaddressed; and, the trial court omitted to consider, on the record, the concomitantly critical question whether the jury's deliberations had proceeded beyond the point that an alternate juror could be substituted without impairing the fairness of the trial. (State v. Marcus Haggan (September 9, 2008; Virginia Drick Messing, Designated Counsel)

JURY INSTRUCTIONS

Conviction for murder reversed where the trial judge committed plain error by instructing the jury that **self-defense** was not available to defendant if he knew that he could avoid the necessity of deadly force by **retreating**, because the jury could have believed that defendant was attacked in his own dwelling and was not the initial aggressor. The erroneous jury instruction on self-defense raised a sufficient doubt as to whether the jury reached a result that it might not otherwise have reached. The jury may have believed that defendant was confronted with a threat of death or serious injury when Olmedo approached him with the cord and brought it towards his neck. The jury may have concluded that defendant had to employ deadly force to protect himself. The jury also may have concluded that self-defense did not apply because defendant could have avoided the use of deadly force by retreating. (State v. Carmelo Cruz, October 16, 2008; Amira Scurato, A.D.P.D.)

The Appellate Division ruled that all of defendant's convictions that were not reversed for lack of evidence must be reversed because the judge gave the jury a faulty jury charge on **accomplice liability**. Specifically, the trial court's "canned"

accomplice liability charge never imparted to the jury the distinctions between the specific intent required for the grades of the offenses. Even though the jury was charged on lesser included offenses, the judge inexplicably chose to use the model jury charge that omits any discussion of the possibility that an accomplice may have a lesser degree of culpability that the principal. See also **CRIMES AND OFFENSES - ELEMENTS**. (State v. Kenneth Daniels, October 23, 2008; Steven M. Gilson, Designated Counsel)

Conviction reversed because the **accomplice liability charge** in this case was not tailored to the facts of the case, and failed to explain how accomplice liability applied to the lesser-included offense. The trial court could have explained, for example, that even if the jury was convinced beyond a reasonable doubt that the principal, by his conduct and words, had the purpose of threatening or placing Steiner in fear of immediate bodily injury, and did so (thus making the principal guilty of robbery), defendant may not have shared that purpose but only had the purpose of stealing money from Steiner (thus constituting a theft from the person). Also, the court did not even mention, let alone explain in unequivocal terms, that the jury could find the principal guilty of robbery but defendant guilty of only theft from the person. Considering the entirety of the record and the charge, the inaccurate and incomplete accomplice liability charge had the clear capacity to mislead the jury to conclude that if the principal committed a robbery, and if defendant acted in concert with the principal in the incident, that defendant must also be found guilty of robbery. (State v. Kevin Davis, October 7, 2008; Karen E. Truncale, A.D.P.D.)

Aggravated manslaughter conviction reversed by the Appellate Division because the trial judge twice misstated, apparently inadvertently, the **interrelationship between the lesser-included offenses of aggravated manslaughter and reckless manslaughter**. This charge was misleading in its direction that the jury "must acquit" defendant of "the homicide charge," rather than "the aggravated manslaughter charge," if it found that his conduct generated only the possibility, and not the probability, of death. We are satisfied that the trial judge's unfortunate misstatements to the jury concerning the interrelationship between the aggravated manslaughter charge and the reckless manslaughter charge were material and not harmless. The error was compounded by the submission of the flawed written charge into the jury room. (State v. Donte Williams, November 10, 2008; Stephen W. Kirsch, A.D.P.D.)

LESSER INCLUDED OFFENSES

Conviction reversed by the Appellate Division. Conviction reversed by the Appellate Division. The judge's failure to provide the jury with the opportunity to consider whether defendant

committed aggravated or reckless manslaughter was erroneous. Because the testimony of Morrieson relating to what was heard from defendant's room and the testimony provided by Jones as to defendant's description of what had occurred were subject to interpretation, we conclude there was a rational basis for a finding of either aggravated or reckless manslaughter and the judge's refusal to give such instructions was erroneous and of significant magnitude to warrant a new trial. The only indications of what had occurred, assuming Tracy's death came at the hands of defendant, were provided by the testimony of Morrieson, who claimed to have heard sounds coming from defendant's room, and by the testimony of Jones, a jailhouse snitch, who recounted what defendant allegedly told him [that he had "choked the life out of" the victim] while they were incarcerated together. The jury could have believed some, none or all of this evidence. And, depending upon what the jury might have found credible, it could have found defendant guilty of aggravated or reckless manslaughter. See also **CONFRONTATION**. (State v. William Chisholm, November 26, 2008; James K. Smith, Jr., A.D.P.D.)

Convictions reversed because the trial court erred by not instructing the jury on **attempted passion/provocation manslaughter** as a lesser included offense of attempted murder. Here the proofs support an argument defendant saw his cousin, with whom he had a close relationship, knocked unconscious with a blow to the face by a stranger. Viewing all the facts in a light most favorable to defendant, a jury could rationally conclude that a reasonable person, upon observing his close relative being struck and rendered unconscious, would be reasonably provoked. It is clear that defendant reacted almost immediately after his cousin struck the floor. Again, viewing the situation in a light most favorable to defendant, it would appear that defendant did not have time to cool off. (State v. Troy L. Jackson, December 16, 2008; Robert L. Sloan, A.D.P.D.)

POST-CONVICTION RELIEF (PCR)

Denial of PCR reversed and case remanded by the Appellate Division. At first hearing, the judge set forth a schedule that clearly contemplated preliminary consideration of the time bar issue prior to consideration of the merits of defendant's ineffective assistance claim. This schedule made sense because, as the judge indicated, there would be no need to address the ineffective assistance claim until and unless the judge resolved the time bar issue in defendant's favor. Thereafter, at the next hearing, after ruling that defendant's PCR petition was not time barred, the trial judge proceeded to rule on the merits of defendant's ineffective assistance of counsel claim, finding that defendant had failed to make a prima facie showing on that claim sufficient to warrant a hearing. the PCR judge erred in dismissing

defendant's petition without giving him an opportunity to make a prima facie showing of ineffective assistance of counsel. (State v. Harry Kittrell, December 1, 2008; Jack Gerber, Designated Counsel)

Denial of PCR affirmed in part, remanded for evidentiary hearing on certain IAC allegations. Massey criticized the failure of trial counsel to interview, and call as a witness, Martin Laderman, the apartment property manager, whom Massey contends would have testified that J.L.'s former husband did sometimes live in her apartment. In his decision, the PCR judge correctly noted the potential importance of such testimony, which would have bolstered Massey's credibility with respect to the consensual nature of the conduct and undercut the victim's contrary testimony. However, the PCR judge rejected the Laderman issue as proof of ineffective assistance of counsel, finding that, because Laderman's assertions were apparently not based on personal knowledge. While Laderman's testimony would not itself have been admissible if based solely on hearsay, the PCR judge should have held an evidentiary hearing to determine whether Massey's trial counsel interviewed Laderman to determine whether he had personal knowledge or could have identified potential witnesses with personal knowledge. (State v. Anthony Massey, October 16, 2008; Richard Sparaco, Designated Counsel)

Denial of PCR reversed, remanded for hearing on merits of petition. Rather than focus on counsel's deficient performance in 1993 when counsel failed to file a PCR brief and failed to insist on the scheduling of a hearing to consider defendant's PCR claims, the trial judge focused only on defendant's nine-year delay in filing his second petition. The judge's approach omitted any consideration of a lawyer's duty to file a brief and present and advance those arguments before the court. The record before us strongly suggests that the attorney assigned to represent defendant on his 1993 petition failed to satisfy those obligations, all of which go to the very heart of the Sixth Amendment requirement of effective assistance of counsel. Despite these failures by counsel, the judge evaluated defendant's nine-year filing delay in a vacuum. The judge's approach ignored counsel's dereliction and failed to analyze whether counsel's omissions satisfy the "defendant's excusable neglect" exception to the five-year time bar of Rule 3:21-12. Unquestionably, had PCR counsel filed a brief in 1993 and insisted on the scheduling of a PCR hearing, defendant would have had no need to file his petition in 2002. (State v. Maurice Romero, October 10, 2008; Joseph A. DiRuzzo, III, Designated Counsel)

The Appellate Division vacated the denial of PCR in part and remanded to the Law Division to consider defendant's claims for relief solely relating to the State's trial proofs concerning a

replica handgun seized by the police from the shared residence of defendant and the victim. Defendant was not charged in this case with a weapons offense, and the gun was not pointed at the victim until after the sexual assault had already transpired upstairs. Defendant argued that the gun was not part of the criminal transaction, and the references to it before the jury should have been excluded. The State argued that the gun proofs were properly admitted as 'res gestae' evidence of a continuous criminal transaction. The Law Division judge did not address these gun-related issues in his ruling on the PCR application. Additionally, since the time of the PCR motion and the parties' briefing on this appeal, the Supreme Court issued two opinions in which at least two justices have questioned the continued vitality of the res gestae doctrine. Rather than decide these unresolved issues concerning the gun proofs on the present record, the Court remanded these issues to the Law Division for that court's initial consideration, particularly in light of the Supreme Court's supervening decisions in Kemp and Barden. Furthermore, even if the res gestae doctrine does not or should not be applied to the gun proofs in this case, we invite counsel and the trial court to explore other alternative theories of admissibility. (State v. Kevin D. Smith, December 1, 2008; Gregory P. Jordan, Designated Counsel)

SEARCH AND SEIZURE

Order suppressing some evidence found in **warrantless search of an apartment** that defendant was present in affirmed, order refusing to suppress other evidence found in search reversed by the Appellate Division. Trial court ruled that police had probable cause to believe that a stolen cell phone was present in the apartment, but that **exigent circumstances** sufficient to justify the warrantless entry were not proven. Melody and his fellow officers knew that the stolen cell phone had recently been used from a location within a short-radius of 112 or 113 Hobson Street. They knew after speaking with Parsons that Williams had recently used the phone, that she lived in a certain house in that vicinity with her mother, and that someone with the last name of Williams was the PSE&G subscriber to a specific unit in the house. They had the house surrounded by police officers and could have with reasonable facility obtained a telephonic search warrant. The Court reversed the trial court's finding that the State had proven Williams' **consent** to expand the search beyond seizing the cell phone and undercover a shotgun and shells in the room because the seizure of the ammunition and shotgun shells in the apartment was not sufficiently attenuated from the prior unconstitutional entry. Melody testified that Williams and her child were removed from the bedroom and another officer obtained her consent shortly thereafter and while the police were still in the apartment securing defendant, the weapon, and the phone they had already found. Williams, who was being detained by the officers at the time, was

clearly aware of that. Her consent could not be viewed as an intervening circumstance that somehow attenuated the connection between the unconstitutional entry of the apartment and the ultimate seizure of the evidence. (State v. Ricky Hubbard, November 6, 2008; Alexander R. Shalom, A.D.P.D.)